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No. 219.

Supreme Court of the United States

October Term, 1949.

KENTUCKY TRUST COMPANY, Executor of the Estate of Martin L. Schmidt, - - Petitioner,

versus

SELDEN R. GLENN, - - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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v.

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REPLY BRIEF FOR PETITIONER.

To the Honorable, the Supreme Court of the United States:

Petitioner feels compelled to point out two patent misrepresentations of the facts which are set forth in the respondent's brief in opposition to our petition and which have shaken our faith in the high standards of fact-stating maintained by the Solicitor General's Office:

1. Respondent states (brief, pages 10 and 11) that the taxpayer's testimony shows he deems it important

to avoid loss of two-thirds family control of the Coca-Cola Bottling Company. Pages 78, 79, 84, and 85 of the record were cited to support this statement.

These pages are reprinted in the appendix to this brief so that the Court may the more readily study their context. We respectfully submit that no support can be found in them for the respondent's statement.

2. Respondent states (brief, page 11) that the taxpayer could determine the terms and conditions of sales and invest the proceeds of such sales in any securities of his choice without regard to the beneficiaries' interests. Pages 126 and 128 of the record, which are also reprinted in the appendix, *infra,* are cited in support of this.

Portions of the opinion of the district court appear in the record at this point. The only language on these pages which we can determine to be germane to the proposition stated in the respondent's brief are the quotations from the trust instrument which appear in the second full literary paragraph which begins on page 126 and the first full literary paragraph beginning on page 128.

These excerpts do not, of course, give the taxpayer the right to determine the "terms and conditions of sales and the right to invest the proceeds of the sale in any securities of his choice without regard to the beneficiaries' particular interests." Indeed, the district court, even though it concluded that the trust instruments were within the purview of *Helvering* v. *Clifford,* stated:

"It will be noticed that his [the taxpayer's] right in this regard [*i. e.,* his right to control the sales of investments and invest the proceeds of sales] is to direct sales, exchanges, etc., 'at such times and in such manner,' but that no mention is made of terms of sale."

Respectfully submitted,

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Counsel.

SKAGGS, HAYS & FAHEY,
Of Counsel.

this provision in the trust agreements was placed in there in order to afford the Trustee the benefit of that judgment rather than to afford Mr. Schmidt any opportunity to manipulate or control that company.

By the Court: He can answer. It will be in the nature of an avowal, I think, but I am going to permit you to take a rather wide range here of your evidence, but I don't think that evidence is ever going to be competent. But you may put it in over the objection of the defendant in this case as to competency.

Mr. Fahey: I would like to ask this question.

Q. What was your reason for the inclusion of that provision at that time in the trust instruments?

A. Well in discussing the features of these instruments, it was clear—or, I thought it was clear to me that my advice on the disposal or acquisition of that single stock would be a help to the Trustee and, so far as I knew, it had no great information on the operation of our company.

Q. What purpose was there in including this right to control it? Did you want to manipulate that stock some way? What reason did you have for putting it in the agreement?

Mr. Miller: We object to that because we think the reason is immaterial.

By the Court: Under the same circumstances you may answer, Mr. Schmidt.

A. There was no thought of manipulation of any kind. But in these instruments it seems you try to give yourself the benefit of what might occur in the future and if this company lost face and disintegrated, it might be my better opinion as to whether the stock should be disposed of or if it continued to be successful whether more should be purchased, knowing as I did that this trust company had had no previous experience, and they are a large, well-pro-

tected, well-fortified company, but they can't keep posted on the details of every little corporation that comes to their attention. Does that answer your question, Mr. Fahey?

Q. Yes, I think it does.

A. All right.

79

Testimony of Martin L. Schmidt

Q. Now there was also included in these trusts a provision that in the event the Trustee found it necessary or desirable to dispose of this Coca Cola stock, it was to offer it to certain members of your family. Do you recall that provision?

A. Yes, sir.

Q. Why was that put in there?

Mr. Miller: Object, for the same reason.

By the Court: Overruled.

Q. You may answer.

A. That was only my pride and interest in this company and this stock, and wanting it to be retained by my immediate family rather than for it to be widely distributed to strangers or even friends. I have tried to acquire more stock in the company at odd times.

Q. Well you stated earlier in your testimony that you believed the stock to be a good investment, did you not?

A. Yes, sir.

Q. Well did that belief influence you in any wise with respect to this provision in the trust?

A. Yes, sir; I would like for my brothers or my wife or my children to acquire stock that I thought so much of myself.

Q. Was your son associated with you there in the company?

A. Only as an employee.

Q. When did he become associated with you?

A. He bought a small number of shares, 20 I believe, to be exact just two years ago, not at that time.

Q. No; I mean as an employee.

A. Well he worked—he went to high school in 1933 to 1936; he worked some with us then and while he was in the

University, in the summertime one year he went North to work with a friend of mine for better experience. He graduated at Tulane University in 1940. He came to work for us then for a year and a half until the navy got him.

Q. Is he back now with you?

A. Yes, sir.

Q. Well did the association of your son in the business have any bearing on the inclusion of this provision that

Testimony of Martin L. Schmidt

Q. And that stock was owned in the same proportion as it was owned in the Coca Cola Bottling Company of Louisville, was it not?

A. Not continuously, Mr. Miller. It was at the time they were established, in 1920.

Q. Now you say that during all of these years you and your brothers did control those companies? And your families?

A. Yes, sir.

Q. Was the stock of the Coca Cola Bottling Company of Louisville, Kentucky, listed on the market?

A. No, sir.

Q. None has ever been sold, that you know of?

A. Except when my father and I bought that stock in 1920.

Q. And none has been sold since that date?

A. No, sir.

Q. And there is no quoted or listed price for it?

A. No.

Q. Now I believe you have testified that when you set up these trusts you talked to a man by the name of Parker T. Spinner, of Wabash, Indiana?

A. Yes, sir.

Q. He was a tax consultant, wasn't he?

A. Yes, sir, I think so.

Q. And you consulted him about the tax angle involved in setting up these trusts, didn't you?

A. Yes, sir.

Q. And you read over the instruments carefully before you signed them, didn't you?

A. Yes, sir.

Q. And you knew what the provisions were?

A. Yes, sir.

Q. You knew that you had retained the power to direct the Trustee in voting this stock. You knew that provision was in there, didn't you?

A. Yes, sir.

Q. You testified, I believe, that the reason you wanted that in there was so if anything came up in the future you would have that power, to step in there and direct the vot-

ing of that stock. Did I get you right on that?

A. Well I did not see any need of me being concerned with the voting of that stock.

Q. Well what made you put that in there?

A. Well it seemed to be, Mr. Miller, a part of the orthodox instruments at that time and to be good business practice.

Q. Because you wanted to be sure that you could step in and vote that stock. If that stock got into somebody's else hands it could make trouble for the company, couldn't it?

A. It couldn't get into other people's hands with my advising them, the Trustee. I had no thought of any condition developing that we would need the voting of that stock.

Q. You also knew that there was a provision in the instrument that you could remove the Trustee at any time you saw fit?

A. Yes, but the other Trustee had to be of the same ability, and of similar size.

Q. That's right. You knew that.

A. Yes, sir.

Q. Did you ask to have that put into the instruments?

A. That was alongside of this other one, and looked like a worthy—

Mr. Fahey (Interrupting): That is objected to, Your Honor. We agreed that that was incompetent, but Mr. Miller thinks so now.

Mr. Miller: Well I am going into it because you did.

Q. Now, were the stocks in either of those other two companies listed on the market?

A. Shelbyville and Elizabethtown, you mean?

Q. Yes?

A. No, sir.

Q. They were closed corporations and there was no quoted value on those stocks, either?

A. That's right.

Q. Now I believe you have testified that your son was working for the company? In what capacity did he work for you?

received by the Trust, add it to principal and reinvest it until the beneficiaries reach twenty-five years of age. At that time, the Trustee is directed to distribute the income to the beneficiaries until they reach forty years of age, at which time the corpora of the trusts are to be distributed to the beneficiaries free of the trusts and the trusts are to end.

It is provided that should the beneficiaries die before reaching forty years of age, then the trusts' corpora are to be distributed on the death of the beneficiaries to the beneficiaries' living descendants. If there are no such descendants, then the distributions are to be made to the living descendants of the Donor of the trusts.

Paragraph IV of each trust instrument provides in part:

> "During the lifetime of Donor, the Trustee is authorized, empowered and directed to lease, mortgage, pledge, sell, dispose of, invest and reinvest properties so held by it, and to vote stocks, exchange one class of securities for another, and agree to compromise with reference thereto *only at such times and in such man-*

ner as may be authorized and directed by Donor in writing." (Italics supplied.)

After the Donor's death, the trust instrument gave the Trustee power to transfer or encumber the trust estate and to invest and reinvest its funds and vote its stock subject to any change, reinvestment or compromise being approved by at least two members of an Advisory Committee. This Committee was to consist of the grantor's wife, his brother, Paul Schmidt and his son, Martin F. Schmidt, or such other persons as the latter might designate in writing to the Trustee. After the grantor's death, vacancies on the Committee were to be filled by surviving Committee members.

The trust instruments further set forth restrictions on the Trustee with respect to investment of trust funds, providing that investment and reinvestment should be only in Government or municipal securities, listed stocks, bonds or other securities rated "Grade A" or better by two reputable rating agencies, or in life insurance contracts on the

Memorandum

Paragraph IX provided:

"This agreement is intended to and shall be irrevocable and Donor hereby relinquishes any and every right in and to the trust estate and the income therefrom and any and every power in connection therewith except *the power to control* investments, change the Trustee and the personnel of the Advisory Committee, as hereinabove set forth." (Italics supplied.)

FINDINGS OF FACT.

I. On December 10, 1938, plaintiff, as grantor, executed and delivered to Kentucky Title Trust Company, Louisville, Kentucky, a corporation organized and existing under the laws of Kentucky (hereinafter sometimes referred to as the Trustee), two trust agreements wherein said Trust Company is named Trustee. One trust agreement established a trust for the use and benefit of plain-

tiff's daughter, Martha K. Schmidt, and the other established a trust for the use and benefit of plaintiff's son, Martin F. Schmidt.

II. On December 10, 1938, plaintiff transferred two hundred (200) shares of the common stock of Coca-Cola Bottling Company, of Louisville, Kentucky, Inc., a corporation organized and existing under the laws of Kentucky (hereinafter sometimes referred to as the Company), to the Trustee under the trust for his daughter, and two hundred (200) shares of such stock to the Trustee under the trust for his son. Such transfers were made pursuant to the terms of the trust instruments. Immediately upon receipt of these shares the Trustee caused all of said shares to be transferred on the books and records of the Company from the name of the plaintiff to its name as Trustee, and said shares during all times material to this action have been registered in the Trustee's name on said corporate books.

III. On December 28, 1940, plaintiff transferred fifty (50) shares of the common stock of the Company to the Trustee under the trust for his daughter and fifty (50) shares of such stock to the Trustee under the trust for his